



Fact Sheet: HHS Proposes to Revise ACA Section 1557 Rule

The U.S. Department of Health and Human Services (HHS) is issuing a proposed rule to revise regulations implementing and enforcing Section 1557 of the Affordable Care Act (ACA). Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities.

PURPOSE OF THE PROPOSED RULE

The proposed rule would maintain vigorous civil rights enforcement of existing laws and regulations prohibiting discrimination on the basis of race, color, national origin, disability, age, and sex, while revising certain provisions of the current Section 1557 regulation that a federal court has said are likely unlawful. The proposal also would relieve the American people of \$3.6 billion in unnecessary regulatory costs over five years, mainly by eliminating the mandate for entities to send patients and customers “notice and tagline” inserts in 15 foreign languages that have not proven effective at accomplishing their intended purpose. Covered entities report that they send billions of these notices by mail each year.

BACKGROUND

Section 1557 is a civil rights provision in the ACA that prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities. Congress prohibited discrimination under Section 1557 by referencing four longstanding federal civil rights laws:

1. Title VI of the Civil Rights Act of 1964 (Title VI) (prohibiting discrimination on the basis of race, color, and national origin).
2. Title IX of the Education Amendments of 1972 (Title IX) (prohibiting discrimination on the basis of sex).
3. Section 504 of the Rehabilitation Act of 1973 (Section 504) (prohibiting discrimination on the basis of disability).
4. Age Discrimination Act of 1975 (Age Act) (prohibiting discrimination on the basis of age).

HHS proposes to ensure the scope of the regulation matches the text of Section 1557 with respect to:

- (1) Any health program or activity, any part of which is receiving federal financial assistance (including credits, subsidies, or contracts of insurance) provided by HHS;
- (2) Any program or activity administered by HHS under Title I of the ACA; and
- (3) Any program or activity administered by any entity established under that Title.

Thus, for example, the rule would apply to federally facilitated and state-based health insurance Exchanges created under the ACA, and the qualified health plans offered by issuers on those Exchanges.

Section 1557 has been in effect since its enactment in 2010, and Congress directed the HHS Office for Civil Rights (OCR) to enforce the provision.

Although Congress prohibited discrimination on the basis of sex in 1972 (Title IX), and Section 1557 applied that law to healthcare and the Exchanges established under the ACA, HHS's 2016 Section 1557 regulation redefined discrimination "on the basis of sex" to include gender identity and termination of pregnancy and defined gender identity as one's internal sense of being "male, female, neither, or a combination of male and female."

As a result, several states and healthcare entities filed federal lawsuits against HHS. On December 31, 2016, the U.S. District Court for the Northern District of Texas issued an opinion in *Franciscan Alliance, Inc. et al. v. Burwell*, preliminarily enjoining HHS's attempt to prohibit discrimination on the basis of gender identity and termination of pregnancy as sex discrimination in the Section 1557 regulation. This federal court concluded the provisions are likely contrary to applicable civil rights law, the Religious Freedom Restoration Act, and the Administrative Procedure Act. The preliminary injunction applies on a nationwide basis. A separate federal court in North Dakota agreed with the reasoning of the *Franciscan Alliance* decision, and stayed the rule's effect on the plaintiffs before it.

Consequently, HHS does not have legal authority to implement the provisions on gender identity and termination of pregnancy in light of the court's injunction which remains in full force and effect today.

On May 2, 2017, the Department of Justice (DOJ) submitted a motion to the Northern District of Texas for a voluntary remand and stay, to allow HHS to "reassess the reasonableness, necessity, and efficacy of the two aspects of the [Section 1557] regulation that are challenged" in litigation.

On April 5, 2019, DOJ filed a brief, on behalf of HHS, in response to plaintiffs' motion summary judgment, in which it stated: "Since the [Section 1557 Final] Rule was issued, the United States has returned to its longstanding position that the term 'sex' in Title VII does not refer to gender identity, and there is no reason why Section 1557, which incorporates Title IX's analogous prohibition on 'sex' discrimination, should be treated differently."

This brief follows the position taken by DOJ before the Supreme Court in a brief filed in October 2018, where the United States took the position that sex for purposes of Title VII refers to biological sex. On April 22, 2019, the U.S. Supreme Court granted petitions for writs of certiorari in three cases, which raise the question whether Title VII's prohibition on discrimination on the basis of sex also bars discrimination on the basis of gender identity or sexual orientation.

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SUMMARY OF THE PROPOSED RULE

What the Proposed Rule Keeps in Place:

- **HHS Would Continue to Vigorously Enforce Civil Rights in Healthcare:** Under the proposed rule, HHS would continue to vigorously enforce all applicable existing laws and regulations that prohibit discrimination on the basis of race, color, national origin, disability, age, and sex based on HHS's longstanding underlying civil rights regulations.
- **Protections for Individuals with Disabilities:** The proposed rule would retain protections in the current Section 1557 regulation that ensure physical access for individuals with disabilities to healthcare facilities, and appropriate communication technology to assist persons who are visually or hearing-impaired.
- **Protections for Individuals with Limited English Proficiency:** HHS proposes to retain the current Section 1557 regulation's qualifications for foreign language translators and interpreters for non-English speakers, and its limitations on the use of minors and family members as translators or interpreters. HHS also proposes to include standards from longstanding LEP guidance in the regulation to ensure meaningful access to health programs and activities for LEP individuals and flexibility in meeting such obligation.
- **Assurances of Compliance:** Under the proposed rule, regulated entities would still be required to submit to HHS a binding assurance of compliance with Section 1557.

Proposed Rule Revisions:

HHS proposes to revise various provisions that are not statutorily supported, are unnecessary, or are duplicative of existing regulations. HHS also proposes to remove costly and unjustified regulatory burdens, to conform the scope of the regulation to HHS's own implementation of the statutory limits set by Congress, and to implement the regulation consistent with all applicable federal civil rights laws.

- **Revise Provisions Preliminarily Enjoined Nationwide in Federal Court**
 - Under the proposed rule, HHS would apply Congress's words using their plain meaning when they were written, instead of attempting to redefine sex discrimination to include gender identity and termination of pregnancy. These redefinitions were preliminarily enjoined because a federal court found they were unlawful and exceeded Congress's mandate. The proposed rule would not create a new definition of discrimination "on the basis of sex." Instead HHS would enforce Section 1557 by returning to the government's longstanding interpretation of "sex" under the ordinary meaning of the word Congress used. HHS also proposes to amend ten other regulations, issued by the Centers for Medicare & Medicaid Services, implementing the prohibition on discrimination on the basis of sex, to make them consistent with the approach taken in the proposed Section 1557 rule.

- HHS proposes to ensure its Section 1557 and Title IX regulations include language Congress enacted that protects religious entities, and that prevents Title IX from requiring performance of, or payment for, abortions.
- **Remove Costly and Unnecessary Regulatory Burdens:** The proposed rule would eliminate burdens imposed by the 2016 regulation's requirement that regulated health companies distribute non-discrimination notices and "tagline" translation notices in at least fifteen languages in "significant communications" to patients and customers. These notices have cost the healthcare industry billions of dollars (a cost which is ultimately passed on to consumers and patients), and data does not show that the notices have yielded the intended benefit for individuals with limited English proficiency.
- **Revise an Enforcement Structure That Created Legal Confusion:** Section 1557 applies multiple civil rights statutes to healthcare settings. As Congress explicitly recognized in Section 1557, HHS has regulations in place for each of those statutes. HHS intends to enforce all those pre-existing statutes and regulations. The 2016 regulation, however, imposed a new single enforcement structure for every type of discrimination claim. Multiple federal courts have rejected various legal theories amalgamated into the 2016 regulation, such as the assertion of private rights of action for Title VI disparate impact claims. HHS proposes to return to the enforcement structure for each underlying civil right statute as provided by Congress and also proposes to remove portions of the 2016 regulation that are duplicative of, or inconsistent with, its longstanding regulations implementing Title VI, Title IX, Section 504, and the Age Act.
- **Revise the Scope of HHS's Enforcement of Section 1557:** HHS proposes to revise the 2016 regulation's interpretation of Section 1557 as applying to all operations of an entity, even if it is not principally engaged in healthcare. The proposed rule would, instead, apply Section 1557 to the healthcare activities of entities not principally engaged in healthcare only to the extent they are funded by HHS. For example, the proposed rule would generally not apply to short-term limited duration insurance, because providers of those plans are not principally engaged in the business of healthcare, and those specific plans do not receive federal financial assistance.
- **Comply with All Applicable Federal Civil Rights Laws, Including Conscience and Religious Freedom Protections:** In addition to ensuring consistent enforcement of longstanding regulations for Title VI, Title IX, Section 504, and the Age Act as passed by Congress and implemented by their HHS regulations, HHS proposes to add a regulatory provision stating that Section 1557 shall be enforced consistent with the ACA's healthcare conscience protections (Section 1303 concerning abortion and Section 1553 concerning assisted suicide); healthcare conscience laws set forth in the Church, Coats-Snowe, Weldon, Hyde, and Helms Amendments; the Religious Freedom Restoration Act; and the First Amendment to the Constitution.

COST-SAVINGS OF PROPOSED RULE

The Section 1557 proposed rule estimates a total cost-savings of approximately \$3.6 billion in the first five years after the rule is finalized. The rule would achieve this mainly by removing ineffective notice and tagline requirements imposed by the 2016 regulation. The 2016 regulation requires that every significant publication in healthcare larger than a postcard sent to a member of the public include a notice of non-discrimination and “tagline” notice translated into at least 15 foreign languages. Covered entities report that they send billions of these notices by mail each year. The data does not show that this requirement meaningfully increased language access since 2016.

At the time the 2016 rule was adopted, the burdens of these notice and tagline requirements on healthcare providers and other covered entities were substantially underestimated at only about \$7.2 million in the first five years. The proposed rule estimates that:

- **Current Cost of the 2016 Rule’s Ineffective and Burdensome Taglines and Notices of Discrimination Paperwork:**
\$ 3.2 Billion (over a 5-year period)
- **Total Savings in the Proposed Rule’s Elimination of Taglines and Notices, and Revision of Language Access and Grievance Procedures:**
\$ 3.6 Billion (over a 5-year period)
- **The Proposed Rule Would Grant Covered Entities Increased Flexibility to Meet Individual Language Access Needs.**

Click to read the [Proposed Rule on Section 1557-PDF](#).